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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

WRITERS GUILD OF AMERICA, WEST, INC., *et al.*,
Petitioners,

v.

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT BRIEF IN OPPOSITION FOR RESPONDENTS AMERICAN BROADCASTING COMPANIES, INC., CBS INC., NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL BROADCASTING COMPANY, INC.

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QUESTION PRESENTED

Whether the Ninth Circuit correctly invoked the doctrine of primary jurisdiction in ordering referral to the Federal Communications Commission for initial consideration issues of regulatory policy under the Communications Act and under the First Amendment concerning actions of Government respondents in connection with the adoption of the "family viewing policy."

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Respondents American Broadcasting Companies, Inc., CBS Inc., National Association of Broadcasters, and National Broadcasting Company, Inc. respectfully request that this Court deny the Petition for a Writ of Certiorari filed herein on April 29, 1980, to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 14, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 609 F.2d 355 (1979) and appears in the Appendix to the Petition at A-4. The opinion of the United States District Court for the Central District of California is reported at 423 F. Supp. 1064 (1976) and appears in the Appendix to the Petition at A-40.[1]

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1979. On January 30, 1980, the court of appeals denied petitioners' motion for rehearing and suggestion of appropriateness of rehearing en banc. The petition for a writ of certiorari[2] was filed on April 29, 1980.[3] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] Hereinafter citations to the opinions below will be given as "609 F.2d at ——, Pet. App. at ——" and "423 F. Supp. at ——, Pet. App. at ——."

[2] Hereinafter citations to the Petition for a Writ of Certiorari will be given as "Pet. at ——."

[3] On May 16, 1980, at the request of these respondents, the time for filing this brief in opposition was extended to June 21, 1980, approximately the same date on which the Government's response was due. Thereafter, at the Government's request, the time for filing oppositions was extended to July 16, 1980.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702, which appears in full in the Appendix to the Petition at A-3, provides in pertinent part:

> A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof.

Section 2342 of Title 28 of the United States Code, 28 U.S.C. § 2342, provides in pertinent part:

> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
>
> (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47. . . .

Section 402(a) of the Communications Act, 47 U.S.C. § 402(a), provides:

> Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.

Section 405 of the Communications Act, 47 U.S.C. § 405, provides in pertinent part:

> After an order, decision, report, or action has been made or taken in any proceeding by the Commission, . . . any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing only to the authority mak-

> ing or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(d)(1) of this title, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear . . . . The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority with the Commission, has been afforded no opportunity to pass . . . .

STATEMENT OF THE CASE

This case arises from the adoption by respondent National Association of Broadcasters ("NAB") of the "family viewing policy," an effort to formulate editorial guidelines for the broadcast of violent or sexually-oriented television programming. The family viewing policy provides that the first hour of network prime time programming as well as the immediately preceding hour should not contain programs unsuitable for general family viewing and that advisories should precede such programs broadcast at later hours.[4]

Petitioners are members of the entertainment industry involved in program production—producers, directors, writers, and actors—who brought these actions against respondents Federal Communications Commission ("FCC" or "Commission"), its individual members, the NAB, and the television networks to challenge the family viewing policy. They alleged that it violated, inter alia, the First Amendment and the Communications Act. The district court, after trial, entered judgment for petitioners. The

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[4] NAB Television Code, Eighteenth Edition (June, 1975), set out at 609 F.2d at 357 n.2, Pet. App. at A-6 n.2.

court below vacated the judgment in order to allow preliminary consideration by the Commission of petitioners' claims against the FCC and its Commissioners.

The NAB is the principal industry association of broadcast licensees. For many years, the NAB has adopted editorial guidelines to assist broadcasters in meeting their responsibility to program in the public interest. Since 1952, these policies have appeared in the NAB Television Code and have addressed the content of programs directed to audiences that include a large percentage of children.[5]

Congress and the Federal Communications Commission have relied on such self-regulatory efforts of broadcasters as the Television Code,[6] recognizing that this approach helps preserve "the widest journalistic freedom consistent with [licensees'] obligations"[7] integral to the system of broadcast regulation. For example, the Commission decided not to adopt rules concerning advertising broadcast during children's programs when the NAB incorporated pertinent limitations into the Television Code. *Children's Television Report and Policy Statement*, 50 F.C.C.2d 1, 13 (1974). In *Action for Children's Television* v. *FCC*,

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[5] The Code includes provisions relating to "advancement of education and culture," "community responsibility," "general program standards," "treatment of news and public events," "general advertising standards," and "responsibility toward children." For each of these areas, the Code standards provide general statements of principle to guide subscribing NAB members.

[6] *See, e.g.*, H.R. Rep. No. 281, 88th Cong., 1st Sess. 25-34 (1963) (network program procurement); H.R. Rep. No. 2670, 83d Cong., 2d Sess. 2-3 (1954) (advertising of alcoholic beverages); *see generally* Levin, *The Limits of Self-Regulation*, 67 COLUM. L. REV. 603, 631-33 (1967).

[7] *CBS* v. *Democratic National Committee* ("CBS v. DNC"), 412 U.S. 94, 110 (1973).

564 F.2d 458 (D.C. Cir. 1977), the Court of Appeals for the District of Columbia Circuit upheld this decision as well within the Commission's discretion.

The family viewing policy came under consideration early in the 1974 television season. As a result of continuing concern about violent or sexually-oriented program content, the NAB began to consider revisions of those portions of the Code dealing with programming for audiences that include children. The NAB's review was prompted by broadcasters' perception of their public responsibilities,[8] as well as growing public and congressional pressure.[9] It also reflected broadcasters' concern that failure to adopt self-imposed policies might lead to formal Commission regulation.[10] Indeed, in 1974, committees of both houses of Congress requested the Commission to report on its actions or plans to limit the impact of the objectionable programming on children.[11]

In preparing its report to Congress, the Commission considered whether formal regulatory action was required or permissible, or whether the Commission should continue to rely on the NAB Code and other self-regulatory efforts. Richard Wiley, then Commission Chairman, believed any formal agency action that directly interfered with the content of television programming posed serious problems under the First Amendment and Section 326 of the Communications Act, 47 U.S.C. § 326, which prohibits Commission censorship. As a result, he preferred affirma-

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[8] 423 F. Supp. at 1094, Pet. App. at A-90 to A-91.

[9] This congressional concern had existed for many years. For a chronology of related congressional hearings, see 609 F.2d at 359 n.5, Pet. App. at A-9 n.5.

[10] 423 F. Supp. at 1099-1102, Pet. App. at A-101 to A-109.

[11] 609 F.2d 358-59, Pet. App. at A-9 to A-10.

tive action on the part of broadcasters that would obviate any need for Commission regulation.

The district court found that Chairman Wiley's efforts to stimulate broadcaster action amounted to "pressure" that resulted in the adoption of the family viewing policy.[12] These efforts consisted of a series of three public speeches in which Chairman Wiley expressed his views on Commission action and urged broadcaster self-regulation, and a series of discussions between Wiley or his staff and representatives of the broadcast industry[13] during which Wiley reiterated his preference for self-regulation and solicited information about broadcasters' efforts to deal with programming considered unsuitable for children.[14] While Chairman Wiley at various times disclaimed any Commission authority to act in this area, he did indicate that Commission rulemaking might be necessary if broadcasters failed to take independent action.[15]

On February 4, 1975, the NAB Television Code Review Board[16] recommended that the NAB Television Board of Directors amend the Television Code by adopting a family viewing policy. On February 19, the Commission is-

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[12] 423 F. Supp. at 1097-98, Pet. App. at A-98 to A-99.

[13] These representatives included the presidents of all three broadcast networks as well as other high-level executives.

[14] 423 F. Supp. at 1092-1119, Pet. App. at A-86 to A-146. Although Chairman Wiley raised several specific proposals which he urged broadcasters to consider for adoption in the Code, these were not included in the revisions. 423 F. Supp. at 1095-1101, Pet. App. at A-94 to A-105.

[15] *Id.*

[16] 423 F. Supp. at 1116-17, Pet. App. at A-140 to A-142. The Code Review Board was responsible for interpretation and administration of the Code and for initial consideration of amendments.

sued its report to Congress noting this recommendation and stating that the Commission would not take regulatory action in this area. Instead, it would rely on the proposed industry self-regulation. *Report on the Broadcast of Violent, Indecent and Obscene Material*, 51 F.C.C.2d 418 (1975). In April, 1975, the NAB Television Board of Directors adopted the family viewing policy substantially as proposed by the Code Review Board.[17]

Petitioners filed two actions[18] in the United States District Court for the Central District of California in the fall of 1975 against the respondent television networks, the NAB, the Federal Communications Commission, and individual Commission members.[19] Both sets of plaintiffs alleged that the NAB's adoption of the family viewing policy violated the First Amendment and the Sherman Act. They also alleged that the Commission's role in that adoption violated the First Amendment and the Commu-

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[17] 423 F. Supp. at 1119, Pet. App. at A-146. At the time the family viewing policy was adopted, "continuing, willful, or gross" refusal by an NAB member to adhere to the Code would have resulted in expulsion from the NAB. 423 F. Supp. at 1123, Pet. App. at A-157; NAB Television Code, Eighteenth Edition (June, 1975). NAB membership is no longer conditioned on adherence to the Code. The only current consequence of Code violations is the inability to display the NAB Code Seal of Good Practice. *See* NAB Television Code, Twentieth Edition (Nov., 1978). Neither NAB membership nor Code subscription has ever been necessary to acquire or renew an FCC broadcast license, or to become or remain a network affiliate. The family viewing policy itself is not being enforced during this litigation. See text at 13, 23 *infra*.

[18] *Writers Guild of America, West, Inc.* v. *ABC* ("Writers Guild"), No. CV 75-3641-F (C.D. Cal.); *Tandem Productions, Inc.* v. *CBS* ("Tandem"), No. CV 75-3710-F (C.D. Cal.).

[19] The actions were consolidated in the district court and in the court of appeals.

nications Act. In the *Writers Guild* case, violation of the Administrative Procedure Act ("APA") was alleged as well. Each complaint sought declaratory and injunctive relief against the private defendants and against the Commission and its members. In addition, the *Tandem* plaintiffs sought damages against all defendants on First Amendment claims and treble damages on antitrust claims. Before bringing these actions, none of the plaintiffs sought to present any of these contentions to the Commission for consideration.

The defendants moved to dismiss on the grounds, inter alia, that the issues raised were within the primary jurisdiction of the Commission. The district court denied these motions, with only brief explanation.[20] Trial of the antitrust claims was stayed.[21] There followed extensive, expedited discovery and then a trial on the merits of the First Amendment, Communications Act, and APA claims.

On November 4, 1976, the district court issued a lengthy opinion holding that the Commission, its members, the networks, and the NAB all violated the First Amendment by their roles in the adoption of the family viewing policy.[22] The court held that the private defendants were liable for damages, but that the Commission and its members were immune from damage liability.[23] The court left the amount of damages for future proceedings.

In its opinion, the court reconsidered the motions to dismiss on primary jurisdiction grounds. Although the

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[20] 423 F. Supp. at 1073, Pet. App. at A-44.

[21] 609 F.2d at 358 n.4, Pet. App. at A-7 n.4.

[22] 423 F. Supp. 1064, Pet. App. at A-40.

[23] 423 F. Supp. at 1158-59, Pet. App. at A-234 to A-236. The court also denied an award of counsel fees to the plaintiffs. 423 F. Supp. at 1159-61, Pet. App. at A-236 to A-240.

court recognized that the Commission was not necessarily excluded from regulating in this area,[24] it gave three reasons for concluding that the FCC had no primary jurisdiction. First, the court rejected the argument that issues surrounding the family viewing policy called on the Commission's "recognized expertise." In its view, the Commission could offer no special insight on the First Amendment questions presented, and there were no factual issues that required the Commission's preliminary determination.[25] Second, the court found that the Commission's views on the merits had been clarified in the course of the litigation and showed that "it ha[d] predetermined the issues adversely to the plaintiffs."[26] Finally, the court held that petitioners' claims raised charges of "serious misconduct" on the part of Chairman Wiley and the Commission which the court believed the Commission could not judge impartially.

The district court's decision on the merits—described by the Ninth Circuit as "inseparable" from its jurisdictional holdings[27]—rested on what it termed a "bedrock principle" of the Communications Act: that each broadcaster has a duty to make independent decisions concerning access to the broadcast medium.[28] Chairman Wiley, the court found, by his speeches and meetings had "pressured" the NAB and the networks into adopting the family viewing policy.[29] Paradoxically, the court also found that the defendants "freely chose" to amend the NAB

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[24] 423 F. Supp. at 1090-92, Pet. App. at A-82 to A-85.

[25] 423 F. Supp. at 1090, Pet. App. at A-82.

[26] 423 F. Supp. at 1081, 1090-91, Pet. App. at A-61, A-82 to A-83.

[27] 609 F.2d 361, Pet. App. at A-14.

[28] 423 F. Supp. at 1131-35, Pet. App. A-173 to A-182.

[29] 423 F. Supp. at 1097-98, Pet. App. at A-98.

Code.[30] Finding accession to such pressure by broadcasters equivalent to the private enforcement of a state-enforced custom of segregation held to be governmental action in *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 171 (1970), and finding that the networks, the Commission, and the NAB had acted jointly, the court held that adoption of the family viewing policy violated the First Amendment.[31] In reaching this decision, the district court sought to distinguish *CBS* v. *DNC*, 412 U.S. 94, in which this Court held that FCC licensees do not violate the First Amendment by adopting editorial policies that have the effect of denying access to some who wish it, and in which a plurality of the Court also found that such action does not amount to governmental action.[32]

The district court granted declaratory relief, ruling, inter alia, that the NAB, by enforcing the family viewing policy, and individual broadcasters, by agreeing to adhere to the policy, violate the First Amendment; any FCC enforcement of the policy is likewise constitutionally prohibited. It certified its judgment in the *Writers Guild* case as final and, pursuant to 28 U.S.C. § 1292(b), authorized an interlocutory appeal in the *Tandem* suit.[33] Following the issuance of the district court's decision, the NAB announced that it would not enforce the family viewing policy during the process of review.[34]

All defendants appealed from the order of the district court. In addition to raising the primary jurisdiction

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[30] 423 F. Supp. at 1158, Pet. App. at A-234.

[31] 423 F. Supp. at 1131-46, Pet. App. at A-173 to A-207.

[32] 423 F. Supp. at 1131 n.120, Pet. App. at A-174 to A-175 n.120.

[33] 423 F. Supp. at 1161-62, Pet. App. at A-240 to A-242.

[34] *See* BROADCASTING, Nov. 15, 1976, at 38.

issues, they urged on various grounds that the district court's decision be reversed.[35]

On appeal, the court below vacated the judgment of the district court on primary jurisdiction grounds.[36] The Ninth Circuit found that the district court had failed to recognize the pervasive and delicate role of the Commission in broadcast regulation. Drawing extensively on this Court's opinion in *CBS* v. *DNC*, 412 U.S. 94, the court emphasized the Commission's pivotal role in striking the balance between the First Amendment interests of the public and of broadcasters on the one hand, and the

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[35] Defendants pointed out that broadcaster action generally has been held not to be state action, and that there was no showing in this case that the broadcasters had been "coerced" by the Commission. While the district court had found that Chairman Wiley's actions were a cause of the adoption of the family viewing policy, it recognized that there were many other causes, including the broadcasters' own views of their public interest responsibilities, and public and congressional pressure. Moreover, the court also found the broadcasters "freely chose" to adopt that policy. *See* 423 F. Supp. at 1158, Pet. App. at A-234.

Defendants also contended that the district court's decision was inconsistent with the basic congressional scheme of broadcast regulation, which preserves for licensees the right to exercise editorial judgment. Indeed, defendants argued, the district court's searching inquiry into editorial motivation and its efforts to determine editorial policies violated the First Amendment. The court's state action finding would convert any editorial response to government concern into a First Amendment violation and would prevent broadcasters from exercising their First Amendment right to avoid governmental action. *See generally* Brief for Appellants American Broadcasting Companies, Inc., CBS Inc., National Association of Broadcasters, Nos. 77-1058, 77-1059, 77-1060, 77-1061, 77-1103, 77-1756, 77-1897 (9th Cir. filed June 27, 1977).

[36] 609 F.2d at 363, Pet. App. at A-20.

statutory concern that broadcast frequencies be used in the public interest on the other. Referral of petitioners' claims to the Commission would provide an express, considered decision by the Commission whether Chairman Wiley's "jawboning" activities were consistent with its role in maintaining this balance.[37]

At the same time, the court of appeals expressed considerable skepticism concerning the district court's decision on the merits as well as its finding that Chairman Wiley caused the NAB to adopt the family viewing policy. The Ninth Circuit stated that "[t]he validity of the district court's analysis fundamentally depends upon whether its bedrock principle is correct and whether its finding of causation is sound. We are not as certain as the district court was." [38]

The court of appeals vacated the judgment of the district court and remanded both cases with instructions to refer the claims involving the FCC to the Commission for its independent determination. The claims against the private defendants were to be held in abeyance pending the outcome of administrative proceedings before the Commission, review in the court of appeals, and if necessary, review in this Court.[39]

SUMMARY OF ARGUMENT

This case presents no issues warranting review by this Court. It does not involve a conflict with any decision of this Court, a conflict among the circuits, or an important question of federal law not previously addressed by this Court. Instead, the decision below represents an appro-

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[37] 609 F.2d at 362-63, Pet. App. at A-17 to A-19.

[38] 609 F.2d at 361, Pet. App. at A-14. See also 609 F.2d at 362, Pet. App. at A-22 to A-23.

[39] 609 F.2d at 366, Pet. App. at A-25.

priate application of traditional legal principles to an unusual factual situation. The correctness of the application of those principles to the unique facts here involved obviously is not an issue warranting Supreme Court review. In any event, the decision below requiring that the Commission's views concerning the claims against the Government be obtained in the first instance was clearly correct.

Moreover, review by this Court would be premature. The Ninth Circuit's judgment is nonfinal, and petitioners have failed to demonstrate circumstances that warrant an exception to the well established policy against interlocutory review. The NAB suspended enforcement of the family viewing policy pending the outcome of this litigation. Because petitioners are therefore subject to no ongoing harm, their claim of urgent need for review is not well founded.

ARGUMENT

I. PETITIONERS HAVE FAILED TO SHOW THAT THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT OR OF ANY OTHER COURT OF APPEALS, PRESENTS IMPORTANT ISSUES WARRANTING REVIEW BY THIS COURT, OR IS ERRONEOUS.

While petitioners cite numerous cases decided by this Court, they point to none with which the Ninth Circuit's decision conflicts Nor do they show that the decision below conflicts with any decision of another court of appeals,[40] or even that it presents important questions of

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[40] Petitioners do cite one lower court case, *Gemini Enterprises, Inc.* v. *WFMY Television Corp.*, 470 F. Supp. 559 (M.D.N.C. 1979), as a conflicting decision. Petitioners fail to note, however, that *Gemini* placed considerable reliance upon the district court opinion in this case before it was vacated. *See id.* at 571.

federal law. Essentially, petitioners urge the Court to grant their petition on the grounds that the decision of the court below is incorrect. To the contrary, application of the primary jurisdiction doctrine to the facts of this case is appropriate under established law.

This Court has held that when a federal court is called on to review matters subject to the regulation of an administrative agency, the doctrine of primary jurisdiction requires the court to defer consideration of the case until the agency has had an opportunity to act.[41] The doctrine rests on considerations of judicial economy and administrative expertise: The "limited functions of review . . . are more rationally exercised by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."[42]

There is no question that the doctrine of primary jurisdiction applies to the Federal Communications Commission.[43] As the agency established by Congress to ad-

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[41] *See, e.g., Ricci* v. *Chicago Mercantile Exch.*, 409 U.S. 289, 306 (1973); *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 63 (1956); *Far East Conference* v. *United States*, 342 U.S. 570, 574-75 (1952).

[42] *Far East Conference* v. *United States*, 342 U.S. at 574-75.

[43] The Commission's expert role has been recognized frequently by the lower federal courts which have deferred to the agency in appropriate cases. *See, e.g., Ambassador, Inc.* v. *United States*, 325 U.S. 317, 324 (1945); *MCI Communications Corp.* v. *AT&T*, 496 F.2d 214, 219-20 (3d Cir. 1974); *Maguire* v. *Post Newsweek Stations*, 24 Rad. Reg. (P&F)2d 2094, 2095 (D.C. Cir. 1972); *Carter* v. *AT&T*, 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967); *Daly* v. *CBS*, 309 F.2d 83, 85 (7th Cir. 1962); *Massachusetts Universalist Convention* v. *Hildredth & Rogers Co.*, 183 F.2d 497

minister a "unified and comprehensive regulatory scheme for the [broadcast] industry," [44] the Commission, since its establishment, has wrestled with and determined the statutory and constitutional issues involved in broadcasting.

It is clear that questions of communications policy and First Amendment concerns are at the heart of this case. Commission policies dealing with, for example, violent and sexually-oriented television programming, the relationship of the NAB Code to the regulatory scheme of broadcasting, the Commission's view of the appropriateness of the NAB family viewing policy, constitutional restraints on Commission action, and the applicability of the First Amendment in the circumstances presented all are involved here. Even a cursory reading of the district court's opinion shows that the court considered and decided issues of regulatory policy as well as constitutional law. Indeed, the district court discussed at length its interpretation of the Communications Act and articulation of regulatory policy,[45] and purported to rely on various Commission policies in deciding the constitutional issues.[46]

Application of the doctrine of primary jurisdiction in this case not only enables the Commission to consider important regulatory and constitutional issues, but also recognizes the congressionally mandated scheme for review

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(1st Cir. 1950); *Ackerman* v. *CBS*, 301 F. Supp. 628 (S.D. N.Y. 1969); *Gordon* v. *NBC*, 287 F. Supp. 452, 455 (S.D.N.Y. 1968); *The Polite Society, Inc.* v. *WLS, Inc.*, No. 74-Civ.-3777 (N.D. Ill. 1975); *McCarthy* v. *Carter*, No. 76-1697 (D.D.C. Sept. 17, 1976), *aff'd*, No. 76-1865 (D.C. Cir. Sept. 22, 1976).

[44] *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940).

[45] *See, e.g.*, 423 F. Supp. at 1128-35, 1143-46, Pet. App. at A-169 to A-182, A-200 to A-207.

[46] 423 F. Supp. at 1143, Pet. App. at A-200 to A-201.

of Commission action. The Communications Act requires that challenges to Commission policies or actions be brought first to the Commission and thereafter, on review, to a United States court of appeals.[47] Congress chose not to involve the many federal district courts in the regulation of broadcasting.[48] That role is committed exclusively to the Commission and to the courts of appeals, reflecting the view that there should be only one initial forum and one set of requirements governing broadcasters.

In summary, many of the issues raised in this case concern the regulation of broadcasting in the public interest and are inappropriate for initial resolution by any court. In establishing the Commission to administer "a unified and comprehensive regulatory system for the [broadcast] industry," *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. at 137, it was the "intention of Congress to occupy the television broadcasting field in its entirety," *Allen B. Dumont Laboratories, Inc.* v. *Carroll*, 184 F.2d 153, 155 (3d Cir. 1950), *cert. denied*, 340 U.S. 929 (1951), and to preclude de novo judicial consideration of the kinds of questions within the ambit of the FCC's jurisdiction.

Petitioners do not dispute that the doctrine of primary jurisdiction applies to the Commission.[49] Indeed, they

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[47] *See* 47 U.S.C. § 405; 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1).

[48] *See, e.g., City of Trenton* v. *FCC*, 441 F.2d 1329, 1333 (3d Cir. 1971); *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F.2d 597, 600 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946).

[49] Pet. at 11. To the extent petitioners contend that the Commission is without authority to regulate in this area and primary jurisdicion therefore does not require that it have an opportunity to express its views, *id.* at 13, they misapprehend the doctrine. A lack of jurisdictional authority to promulgate rules or grant relief does not diminish the value

acknowledge that "had this case been brought against the networks alone, invocation of the doctrine might have been proper." [50] Petitioners argue, however, that on the facts of this case the court of appeals erred in applying the doctrine. Their arguments in this respect are numerous, but none provides a ground for reversal.

First, petitioners argue that this case involves Commission "wrongdoing" and that invocation of primary jurisdiction is inappropriate when an agency would have to examine the propriety of its own conduct.[51] Petitioners' assertion that administrative agencies are never called on to review their own actions is incorrect. Agencies often are required to judge the legality of prior actions [52]

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of the Commission's views on the issues involved, and the expertise and insight of the Commission will substantially benefit a reviewing court in this sensitive area. *See, e.g., Thompson* v. *Texas Mexican Ry.*, 328 U.S. 134 (1946); 3 K. Davis, ADMINISTRATIVE LAW § 19.07, at 39 (1958). Moreover, contrary to petitioners' assertions, the Commission has been held to have a role in the regulation of "indecent" programming. *See FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978).

Petitioners' argument that primary jurisdiction is not applicable in cases requiring policy formulation, but only when technical factfinding must be allocated between courts and agencies, is similarly incorrect. Primary jurisdiction affords an agency the opportunity to articulate regulatory policy and state its views concerning specialized issues with which it constantly deals. *E.g., Atchison, T. & S. F. Ry.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 820-21 (1973); *United States* v. *Western Pac. R.R.*, 352 U.S. at 65.

[50] Pet. at 11.

[51] *Id.* at 10-11.

[52] *See, e.g., Action for Children's Television* v. *FCC*, 564 F.2d at 468; *WKAT, Inc.* v. *FCC*, 296 F.2d 375 (D.C. Cir.), *cert. denied*, 368 U.S. 841 (1961); *WORZ, Inc.* v. *FCC*, 268

and constantly "revisit" their decisions when determining whether to grant petitions for reconsideration. Indeed, Section 405 of the Communications Act, 47 U.S.C. § 405, precludes judicial consideration of agency action—wrongful or otherwise—where, as here, the issue has not been raised before the Commission and the parties seeking judicial review did not appear before the agency.

An agency's expertise concerning its past action is obviously substantial, and judicial review is available if the agency incorrectly rejects allegations of wrongdoing. Petitioners seek to dismiss the requirement of exhaustion of remedies on the ground that it would be futile.[53] The short answer is that, contrary to the intent of the Communications Act, petitioners never gave the agency an opportunity to consider their claims, and the argument that exhaustion would have been futile is pure speculation.

Second, petitioners urge that the First Amendment implications of the regulatory policies involved in this case render application of primary jurisdiction inappropriate. This contention overlooks the Commission's frequent consideration of constitutional questions concerning the regulation of broadcasting.[54] Moreover, petitioners' argu-

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F.2d 889 (D.C. Cir. 1959), *cert. denied*, 376 U.S. 914 (1964); *Massachusetts Bay Telecasters, Inc.* v. *FCC*, 261 F.2d 55, 66-67 (D.C. Cir. 1958), *cert. denied*, 366 U.S. 918 (1961).

[53] Pet. at 13-15.

[54] *See, e.g., FCC* v. *Pacifica Foundation*, 438 U.S. 726; *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978); *CBS* v. *DNC*, 412 U.S. 94; *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); *NBC* v. *United States*, 319 U.S. 190 (1943); *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977); *National Ass'n of Independent Television Producers & Distributors* v. *FCC*, 516 F.2d 526 (2d Cir. 1975); *Yale Broadcasting*

ment is irreconcilable with this Court's opinion in *CBS* v. *DNC*.[55] In that case, the Court ruled that where claims of unconstitutional action are presented, the Commission has special expertise because the constitutional and statutory questions in broadcasting are inevitably intertwined.[56] In evaluating First Amendment claims, the Court concluded, the judgment and experience of the Commission are entitled to "great weight." [57] Thus, reference of such issues to the Commission for an initial determination is not merely appropriate, but essential.

Third, petitioners argue that referral to the agency will impede judicial review of alleged First Amendment violations, contrary to this Court's doctrine that such restraints demand prompt review.[58] As we discuss,[59]

Co. v. *FCC*, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973); *Mark* v. *FCC*, 468 F.2d 266 (1st Cir. 1972); *Mt. Mansfield Television, Inc.* v. *FCC*, 442 F.2d 470 (2d Cir. 1971); *National Ass'n of Theatre Owners* v. *FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). *See also Action for Children's Television* v. *FCC*, 564 F.2d 458; *Children's Television Report and Policy Statement*, 50 F.C.C.2d 1.

[55] 412 U.S. 94.

[56] *Id.* at 102.

[57] *Id.*

[58] Petitioners also contend that the limited discovery privileges they will be afforded if forced to proceed before the Commission will place an intolerable burden on the vindication of their asserted First Amendment rights. Pet. at 21-22. Commission rules, however, provide for ample discovery whenever relevant issues of fact arise which require resolution in a hearing. *E.g.*, 47 C.F.R. §§ 1.315-.321 (depositions); 47 C.F.R. § 1.323 (interrogatories); 47 C.F.R. § 1.325 (discovery and production of documents and things for inspection, copying, or photographing); 47 C.F.R. §§ 1.331-.340 (subpoenas). In any event, petitioners in this case have already had almost unlimited discovery in the district court.

[59] See text at 13 *supra*, 23 *infra*.

there is no continuing constitutional violation even under petitioners' theory. The First Amendment cases on which petitioners rely [60] are therefore inapposite.

Fourth, petitioners claim that, even if the issues in this case were once suitable for Commission consideration, deferral to the agency at this stage of the proceeding would be unnecessary.[61] Petitioners argue that the Commission's views on these issues have already been made known in the course of this proceeding, making further agency consideration superfluous. In fact, as the court of appeals correctly found, petitioners never sought the views of the Commission.[62] At most, only the views of one Commissioner—Chairman Wiley, who is no longer a member of the Commission [63]—were explicitly and formally stated.

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[60] Pet. at 18.

[61] *Id.* at 13-14.

[62] Petitioners' reliance on cases such as *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 353 (1963); *United States* v. *Western Pac. R.R.*, 352 U.S. at 69; and *Rosado* v. *Wyman*, 397 U.S. 397, 406-07 (1970), is therefore misplaced. Pet. at 13-14. *Philadelphia Nat'l Bank* and *Western Pac. R.R.* refer to instances where the agency involved had the opportunity to consider formally the issues raised and had taken official action. Here, however, the FCC has not yet been presented with petitioners' claims. In *Rosado*, the Court held primary jurisdiction inapplicable because the agency "ha[d] no procedures whereby [the petitioners could] trigger and participate in the Department's review of state welfare programs." 397 U.S. at 406. Petitioners in this case had recourse to several procedures that could have prompted initial Commission consideration. *See* 5 U.S.C. § 554(e); 47 U.S.C. § 405; 47 C.F.R. §§ 1.2, 1.401, 1.41.

[63] Since the actions complained of occurred, the composition of the Commission has changed. Charles Ferris replaced Richard Wiley as a Commissioner and as Chairman in 1977. Of the Commissioners named as defendants in these cases,

And statements made by Department of Justice lawyers representing the Commission during the course of the litigation below cannot be construed as Commission action.[64] It is well established that the Commission speaks only through formal actions it takes as an agency.[65] Just as "courts may not accept appellate counsel's *post hoc* rationalizations for agency action," [66] the positions taken in

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only Commissioners Lee, Quello, and Washburn remain members of the FCC.

[64] *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 169 (1962). *See CBS* v. *FCC*, 454 F.2d 1018, 1033-34 (D.C. Cir. 1971) (applying principle to statements made on behalf of the Federal Communications Commission by counsel for the agency).

[65] Petitioners rely on language in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 417 (1971), to support the proposition that the informal and independent actions of Chairman Wiley constitute judicially reviewable Commission action. Pet. at 25. This case is inapposite. In *Overton Park*, the Secretary of Transportation was confronted expressly with a request for federal funds to construct a highway; he formally considered that request; and he issued an official administrative order. The Court held that because judicial review could proceed on the basis of the administrative record before the agency, a remand requiring the Secretary to make formal findings was unnecessary. Here, petitioners never brought their claims to the FCC; the agency never considered those claims nor issued any kind of official decision. And there is no "administrative record" on which to base judicial review. Moreover, the Court in *Overton Park* expressly disapproved the practice of using materials prepared for litigation as a basis of judicial review. 401 U.S. at 419. Petitioners attempt to define the Commission's position through reference to "papers" filed with the district court, Pet. at 15, must therefore fail.

[66] *Burlington Truck Lines* v. *United States*, 371 U.S. at 168. *See, e.g., SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943).

an advocate's brief are not binding agency opinions. Thus, the Ninth Circuit properly concluded, "[i]t is not known . . . what the position of the FCC would have been, or in the future will be, when confronted by the plaintiffs' claims in a proper administrative proceeding." [67]

Finally, petitioners contend that application of the doctrine of primary jurisdiction somehow conflicts with the APA.[68] They point to Section 10(a) of the APA,[69] which entitles "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action" to judicial review. But this section merely creates a remedy when no statutory provision provides a specific avenue of judicial review. *See Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-41 (1967). Section 10(a) is therefore inapplicable where, as here, the Communications Act expressly confers on the courts of appeals jurisdiction to review Commission actions. 47 U.S.C. § 402(a).

II. SINCE THE DECISION OF THE COURT OF APPEALS IS NONFINAL, THE CASE IS NOT RIPE FOR REVIEW BY THIS COURT.

This Court traditionally has refused to review interlocutory judgments of federal courts.[70] The prohibition,

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[67] 609 F.2d at 364, Pet. App. at A-20.

[68] Pet. at 23-26.

[69] 5 U.S.C. § 702.

[70] *See, e.g., Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584-85 (1952); *Cobbledick* v. *United States*, 309 U.S. 323, 324-25 (1940); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (lack of finality "of itself alone furnished sufficient ground for the

although not jurisdictional, conserves limited judicial resources and avoids piecemeal litigation. Interlocutory review has been held proper only in limited circumstances involving exceptional facts.[71]

The Ninth Circuit's decision in this case is clearly interlocutory, and many complex issues remain to be decided. If petitioners disagree with the Commission's action after the referral, they may seek review pursuant to Section 402(a) of the Communications Act, 47 U.S.C. § 402(a). Action taken during the multiple administrative and judicial stages still remaining in this case not only may alter the content of any review by this Court but also may obviate entirely any claim for such review.[72]

Petitioners nevertheless urge this Court to make an exception to the policy against interlocutory review. They argue that referral to the Commission will delay judicial review of restraints on broadcast speech which "will be allowed to continue unabated, stifling exercise of First Amendment rights on an ongoing basis."[73] Even on its own terms the argument fails because NAB enforcement of the family viewing policy was suspended after issuance of the district court's opinion and has not been reinstated.

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denial"); R. Stern & E. Gressman, SUPREME COURT PRACTICE § 4.19 (5th ed. 1978).

[71] *See Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 153 (1964); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945); *American Construction Co.* v. *Jacksonville T. & K. W. Ry.*, 148 U.S. 372, 384 (1893).

[72] *See American Construction Co.* v. *Jacksonville T. & K. W. Ry.*, 148 U.S. at 384 ("many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters").

[73] Pet. at 20.

Significantly, petitioners failed at any time to seek a temporary restraining order against the asserted restraint, and although they initially sought a preliminary injunction, they chose not to pursue that remedy. Finally, the delay in resolution on the merits which has occurred in this case is the result of petitioners' decision not to seek relief from the Federal Communications Commission in the first instance.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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